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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Docket No. 72 - 1508

STATE OF NEW JERSEY AND HOWARD YEAGER, PRINCIPAL KEEPER OF THE NEW JERSEY STATE PRISONS, and U. SAMUEL VUKCEVICH, SUPERINTENDENT OF THE NEW JERSEY STATE PRISON AT RAHWAY, NEW JERSEY,

Petitioners,

v.

UNITED STATES OF AMERICA ex rel. CLAY THOMAS,

Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1972

Docket No.

STATE OF NEW JERSEY AND HOWARD YEAGER, PRINCIPAL KEEPER OF THE NEW JERSEY STATE PRISONS, and U. SAMUEL VUKCEVICH, SUPERINTENDENT OF THE NEW JERSEY STATE PRISON AT RAHWAY, NEW JERSEY,

Petitioners,

v.

UNITED STATES OF AMERICA ex rel. CLAY THOMAS, Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, State of New Jersey and Howard Yeager, Principal Keeper of the New Jersey State Prisons, and U. Samuel Vukcevich, Superintendent of the New Jersey State Prison, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on January 23, 1972, and issued in lieu of a formal mandate on February 14, 1973. That judgment affirmed in part and reversed in part the opinion and order of the United States District Court for the District of New Jersey filed March 7, 1972, as amended by order dated April 10, 1972. As modified, the Circuit Court's judgment provided that the portion judgment of the district court granting the writ of habeas corpus and ordering the petitioner's (Thomas') enlargement from State custody pending the State's appeal be affirmed, but that the remainder which directed the Passaic County Court to fix bail, and further directed the Clerk of the Passaic County Court to accept from the petitioner a personal recognizance bond in the amount of $25,000 be vacated. The aforesaid judgment of the United States Court of Appeals for the Third Circuit is appended hereto in Appendix A.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is attached hereto as Appendix B. The opinion of the United States District Court for the District of New Jersey, including the recommendations of the United States Magistrate, are attached hereto as Appendix C.

JURISDICTION

The judgment of the United States District Court for the District of New Jersey was filed March 7, 1972, amended and entered on April 10, 1972. The judgment of the United States Court of Appeals for the Third Circuit, affirming in part and reversing in part the District Court judgment, was entered on January 23, 1973, and issued in lieu of a mandate on February 14, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. §2254(1).

QUESTIONS PRESENTED

I. Should the scope of review in a collateral proceeding be restricted to an examination of whether the state court applied the proper legal standard?

II. Was the identification procedure so unnecessarily suggestive as to give rise to a very substantial likelihood of misidentification?

III. As the record was insuffieient for resolution of the constitutional issues adverse to the prosecution, should not the Circuit Court have remanded the cause for an evidentiary hearing?

CONSTITUTIONAL PROVISIONS AND STATUES INVOLVED

U.S. Const., Art. I, §9, ch.2:

> "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion of invasion the public safety may require it."

U.S. Const., Amend. XIV:

> ". . . No state shall . . . deprive any person of life, liberty, or property, without due process of law . . ."

28 *U.S.C.* §2254 (b):

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state or that there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

28 *U.S.C.* §2254 (d):

"In any proceeding instituted in a federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court, a determination after a hearing on the merits of a factual issue, made by a state court of competent jurisdiction in a proceeding to which the applicant for the writ and the state or an officer or agent thereof are parties, evidenced by a written finding, written opinion, or other reliable and adequate indicia, shall be presumed to be correct, unless the applicant shall establish or shall otherwise appear, or the respondent shall admit —

. . .

(3) that the material facts were not adequately developed at the state court hearing . . ."

. . .

28 *U.S.C.* §2244(a):

"No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not heretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry."

STATEMENT OF THE CASE

On January 23, 1973, the Honorable John B. Gibbons, Circuit Judge, filed a judgment which ordered the issuance of a writ of habeas corpus, as well as the petitioner's enlargement from state custody pending the State's appeal. 28 *U.S.C.* §2241.

Judge Gibbons found that the question of whether a pre-trial identification has been conducted in an impermissibly suggestive manner, and hence is inadmissible, is a mixed question of fact and law. *Townsend v. Sain*, 372 *U.S.* 293, 309 n. 6 (1963); 28 *U.S.C.* § 2254 (d). Thus, he concluded that such questions might properly be considered by a federal habeas corpus court. He found further that the question of whether or not the impermissibly suggestive pre-trial identification procedure tainted the later in-court identification had not been considered by the state courts, as they found the pre-trial identification acceptable.

> "Thus, the state's position on appeal from the order granting the writ depends entirely upon the suggestibility of the pre-trial photographic identification procedure to which John Cosmi was subjected. If, on the merits, the district court correctly held that it was unduly suggestive, it falls, and the in-court identification on this record falls with it." (opinion, Appendix B).

In a related consideration Judge Gibbons found that the trial court committed constitutional error when it permitted evidence of the pre-trial photographic identification into evidence for the truth of the matter asserted, and also when it permitted the witness, whose identification testimony was in issue, to make an in-court identification without first finding by clear and convincing evidence that such identification had an independent source.

The remaining determinations reached by the Circuit Court are not pertinent to this Petition.

This Petition and the prior proceedings arise out of an armed robbery perpetrated by the defendant and an unknown accomplice on March 22, 1968. Armed with guns, the two men robbed Mr. Edward Cosmi and assaulted his father, Mr. John Cosmi, after entering the former's real estate office, ostensibly seeking an apartment to rent.

Edward Cosmi stood face-to-face with the two men, under "very good" lighting conditions, for approximately three minutes, discussing apartments. After the robbery began, the assailants escorted Edward to the back room of the establishment where the lighting was characterized as "adequate." The group remained there between five and ten minutes, during which period Edward was not always able to observe defendant facially, as defendant was holding a gun to his back.

The elder Cosmi, a 69 year old tailor, was working in the back room when his son and the thieves entered and a "stick-up" was announced. Twice during the course of the robbery he was assaulted by defendant's accomplice, once as he attempted to call the police and again when he tried to flee. The attempted escape resulted in his being knocked unconscious with the butt of a gun. He was thereafter placed in another room.

Despite these assaults, John Cosmi was able to observe the accomplice face to face for about three minutes, and the defendant for about a minute. He stated that the two men were "in his presence" for approximately five minutes.

The day after the robbery Edward Cosmi went to Paterson Police Headquarters where, after viewing some 12 to 18 photographs he recognized one of the holdup men. He thereupon identified defendant Clay Thomas as the one to whom he had spoken and who had held the gun in his back.

At approximately 2:00 A.M. on March 25, 1968, Edward Cosmi was called back to police headquarters by a local police detective. When Cosmi arrived at around 3:30 or 4:00 A.M., the detective met him and told him to "come upstairs and see the fellow." When they arrived at the third floor, Cosmi was escorted into a room where he immediately recognized Thomas as the same man whose picture he had previously identified, and who had spoken to, and later guarded him, the night of the robbery. To further substantiate the identification, Cosmi asked that the defendant's glasses be removed, at which time he reiterated his prior conclusion. Cosmi also acknowledged that all the other men present in the room were detectives, and all were Caucasian.

John Cosmi, hospitalized for several days as a result of the assault, did not go to police headquarters until March 26. Accompanied by his son Edward, the two simultaneously viewed the photographs supplied by the police. The elder Cosmi was not certain who picked the defendant's picture out first, but stated he

did recognize the defendant's picture as that of one of the perpetrators. He further noted that he had not recognized any other photographs before picking out defendant's.

The trial court ruled that the photographic identification by the elder Cosmi was admissible. Testimony relating tothe corporeal identification made by the son, Edward Cosmi, was excluded as the procedure utilized in that instance was deemed unnecessarily suggestive. The trial court further concluded that Edward Cosmi was able to make an in-court identification independent of and purged of the improper pre-trial confrontation. The trial court ruled that the son's pre-trial photographic identification of Thomas was admissible.

At trial, both Cosmis made positive in-court identifications of the defendant Thomas. Thomas did not present any witnesses after the State rested its case, and did not testify in his own behalf.

The cause was thereafter submitted to the jury. After deliberating slightly more than five hours, the jury informed the trial court that it was unable to agree upon a verdict. The trial court inquired of the jurymen and concluded that additional time might result in a dispositive finding. The court then gave an Allen-type charge.

The jury retired again at 8:45 P.M. and returned to the courtroom at 9:30 P.M. to announce that they had found defendant guilty of armed robbery.

On direct appeal, the Superior Court, Appellate Division, affirmed Thomas' conviction in an unpublished per curiam opinion. The New Jersey Supreme Court denied certification.

The Federal District Court, per Judge Shaw, issued a writ of habeas corpus conditionally releasing Thomas upon the State's failure to retry him within 60 days. The court below found that the photographic identification of Thomas by John Cosmi was improper and that his in-court identification was thus tainted. That finding was subsequently affirmed by the United States Court of Appeals for the Third Circuit.

This petition by the State of New Jersey follows.

REASONS FOR GRANTING THE WRIT

POINT I

THE SCOPE OF REVIEW IN A COLLATERAL PROCEEDING IS RESTRICTED TO AN EXAMINATION OF WHETHER THE STATE COURT APPLIED THE PROPER LEGAL STANDARD.

Substantial interest of federalism and comity militate for a narrow scope of collateral review of state Court judgments of conviction. In fact, Congress deemed it appropriate for the federal courts to presume the correctness of the factual findings made by the state courts when considering a petition for a writ of habeas corpus. 28 *U.S.C.A.*§ 2254 (d); see also 5 Moore, *Federal Practice* §52.03(1) (2d Ed. 1951). And, although federal courts have the authority to disregard state fact-findings when they are not fairly supported by the record, it is submitted that this authority must be strictly confined to those cases in which an evident injustice has been done. In all other situations the scope of collateral review should be restricted to an examination of whether the proper legal standard has been applied by the state court.

In 1963, this Court in *Fay v. Noia,* 372 *U.S.* 391, *Townsend v. Sain,* 372 *U.S.* 293, and *Sanders v. United States,* 373 U.S. 1, broadened the permissible scope of review in a habeas corpus proceeding. Such an expansion of the traditional habeas remedy is an unnecessary detriment to the judicial system, and a threat to the very concept of federalism. This case presents this Court with an opportunity to clarify the responsibility of the lower federal courts in a proceeding involving a collateral attack on a state court conviction, and to limit their perogative to those cases where intervention is necessary to vindicate a constitutional right gone unrecognized by the state courts.

As it exists today, a petition for a writ of habeas corpus has become a routine vehicle for review of state criminal judgments. Such a perversion of the great writ has resulted in a serious backlog in the lower federal courts, and has substantially increased the workload of this Court. *Cf.* Daub, "The Case Against Modern Federal Habeas Corpus," 57 *ABAJ* 323 (1971). Simply

put, the "one more appeal" status currently afforded the habeas remedy has contributed to the federal courts' inability to discharge its business. See *United States ex rel. Seamen v. Cryan*, 329 *F. Supp.* 875 (D. N.J. 1971); *United States ex rel. Troy Victor v. Yaeger*, 330 *F. Supp.* 802 (D. N.J. 1971).

If the lower federal courts stand in "review" of all state courts, both trial and appellate, there is no logical reason to retain criminal appellate jurisdiction in the states. The duplication of effort is wasteful. Moreover, the assumption of expansive jurisdiction by the lower federal courts through habeas corpus proceedings relegates the state's judiciary to a subservient position. It is inconceivable that a federal judge is gifted with that enlightenment which enables him, as a single individual, to effectively overrule all the state judges who previously passed on the same question, often without any disagreement among themselves.

Thus, the State of New Jersey requests this Court to reexamine its rule that "mixed questions of fact and law, which require the application of a legal standard to the historical-fact determination, are not facts . . .," and therefore not binding on the federal courts even if fairly supported by the record. See *Townsend v. Sain, supra* at 309, n. 6. In its stead, this Court should proscribe the scope of "review" of state court judgments in a collateral proceeding to a determination of whether the proper legal standard was applied.[1] The application of the legal standard, where it involves the resolution of factual issues, should be afforded the statutory presumption of correctness. 28 *U.S.C.*-§ 2254 (d).

The Circuit Court in this case, following this Court's pronouncement in *Townsend v. Sain, supra,* concluded that the effect or impact of a specific identification procedure upon a particular individual was a question of mixed-fact and law, and therefore not entitled to the presumption of correctness under 28-*U.S.C.* §2254(d). Petitioner urges that a determination of whether an identification procedure was so unnecessarily suggestive to the individual identifying witness as to give rise to a very substantial likelihood of misidentification in a particular

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[1]The same scope of review should obtain whether the legal standard was applied implicitly or literally pronounced on the record.

case is a factual determination, and as such entitled to the presumption of correctness.

In this case the trial court found that the procedure did not possess the capacity to lead to misidentification, and therefore permitted the introduction of testimony relating to it. As to the factual nature of the issue see *United States v. Johnson*, 452 *F. 2d* 1363 (D.C. Cir. 1971); *Biggers v. Neil*, 448 *F. 2d* 91 (6 Cir. 1971(, affirmed —*U.S.*— (1973). *Clemons v. United States* 408 *F.2d* 1230 (D.C. Cir. 1968), *cert.* denied 394 *U.S.* 964 (1969). Once the court determined that this identification testimony was admissible, it had no occasion to consider the adjunct question of taint. These conclusions were affirmed by the Superior Court of New Jersey, Appellate Division. Certification was denied by the New Jersey Supreme Court.

The factual determinations made by the state court should not be disturbed. Petitioner submits that it cannot reasonably be concluded on the basis of the record that the photographic identification by John Cosmi was the product of a procedure that was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. *Simmons v. United States*, 390 *U.S.* 377 (1968).

In other terms, based on the standard of review of 28 *U.S.C.*-§2254(d), the record below clearly supports the finding of the trial and appellate courts that the out-of-court photographic identification by John Cosmi was admissible since, as a matter of fact, the procedure utilized in this case was not so suggestive as to give rise to the very substantial likelihood of misidentification by the witness. Once that determination was made, the weight and credence to give such testimony was solely one within the province of the jury.

Finality of judgment, especially as to factually oriented matters, is a salutory goal, be it in a civil or a criminal matter. No one holds a better vantage point than does the initial trier of the fact; that being so, a reviewing court should yield to this unique expertise. It follows therefore, that the federal district court in a collateral proceeding should not be permitted to substitute its own conclusion as to the effect of a specific identification procedure on a particular witness.

POINT II

EVIDENCE OF A PHOTOGRAPHIC IDENTIFICATION, NOT THE PRODUCT OF A PROCEDURE SO IMPERMISSIBLY SUGGESTIVE AS TO GIVE RISE TO A VERY

In *Simmons v. United States,* 390 *U.S.* 377 (1968), this Court held that "convictions based on eyewitness identification at trial following a pre-trial identification by photograph will be set aside . . . only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Id.* at 384. The Court thus declined to ban the use of pre-trial photographic identifications as a general proposition; rather, each must be individually considered on the totality of its facts. The Court in *Simmons* relied on *Stovall v. Denno,* 388 *U.S.* 293 (1967), which held that an identification confrontation which is "unnecessarily suggestive and conducive to irreparable misidentification" would deprive an accused of due process of law. *Id.* at 302.

Accordingly, the lower federal courts as well as the state courts have established a two-pronged inquiry to aid in determining the due process issue:

"(1) Whether the photographic display itself was impermissibly suggestive and (2) if so, whether there is nevertheless an independent source for the in-court identification."

See *United States v. Johnson, supra* (452 *F.2d* (1363);- *United States v. Gambrill,* 449 *F. 2d* 1331 (5 Cir. 1971) *United States v. Sutherland,* 428 *F. 2d* 1152 (5 Cir. 1970). Implicit in the first prong is the consideration of the witness' susceptibility to making a misidentification.

The two-pronged test necessarily involves the factual determination of whether the particular identification procedure used was suggestive to the particular identifying witness, and whether that suggestion was conducive to irreparable misidentification under the circumstances of the particular case. Thus, the ultimate issue to be determined is whether the identification is reliable.- *Biggers v. Neil,* —*U.S.*—(1973). This case presents this Court with an opportunity to extend the rule of the *Biggers* case to post-*Stovall v. Denno, supra,* situations. Logically, since the ultimate

obligation of the criminal process is to ferret out the truth, the reliability of the identification testimony should be keynote of the due process standard.

These determinations concerning a witness' susceptibility to suggestion are particularly within the province of the trial court since the issues ultimately involve questions of credibility. There are certainly objective factors to be considered in evaluating the possibility of misidentification as a matter of due process (see *e.g.*, *United States v. Wade*, 388 *U.S.* 218, 241 (1967)) however, the legal conclustion is so intertwined with the accompanying factual determinations that the standard on review, especially collateral review, whould be whether the factual determinations made by the trial court were fairly supported by the record as a whole. See the authorities cited in Point I, *supra*.

Applying this criterion to the instant appeal, the State of New Jersey respectfully submits that there is no basis on which to overturn the trial court's ruling that John Cosmi's photographic identification of Thomas was admissible in evidence. Assuming, however, that the habeas court is free to make an independent conclusion from the record, it is submitted that the identification procedure used in this case comported with the requirements of due process.

The thrust of Thomas' argument on the due process issue in the District Court was that the state authorities had failed to place Thomas in a lineup. Instead, John Cosmi was permitted to make a photographic identification. The petitioner claimed that any post-custody photographic identification was a means through which *United States v. Wade, supra* could be circumvented. Thur, the issue was framed to the District Court as one in which due process could be denied by the failure of the police authorities to afford an accused the fairest possible means of an identification confrontation.

The District Court below did not rule on petitioner's assertion in this context. Rather, that court adopted the finding of the magistrate:

> "John Cosmi's photographic identification of petitioner, by his own testimony, clearly was much more his son's conclusion than his and therefore was so unnecessarily suggestive as to deprive petitioner of due

process particularly in the light of the relationship between John and Edward Cosmi.

> Additionally, we see no reason to limit the condemnation of *Stovall*, in this case, to improperly suggestive procedures initiated and/or executed by law enforcement personnel to the exclusion of laymen. Such selectivity would be totally illogical and utterly without saving rationale particularly where, as here, the police had it within their power to hold the identification procedure free of undue suggestion." (Report and Recommendations, Appendix C).

The District Court's opinion makes no blanket condemnation of photographic identification. Instead, its reasoning suggests that it was within the power of the police "to hold the identification procedure free of undue suggestion" by placing "petitioner and others in an appropriate lineup and then giving (John Cosmi) the opportunity to make his identification independently of the suggestion of another." (Report and Recommendations, Appendix C).

The Circuit Court agreed with the District Court's conclusion "that the pre-trial photographic identification procedure to which John Cosmi was subjected on March 27, 1968, did not meet minimum due process standards." (Opinion, Appendix B). This opinion was premised on the fact that, during the photographic identification procedure, the elder Cosmi was accompanied and assisted by his son, who had previously identified Thomas. At no place in its opinion did the Circuit Court consider the reliability of the elder Cosmi's identification. It is submitted this neglect was error, especially where that identification was corroborative of a previous and unrelated identification by another individual, albeit his son's.

The Circuit Court placed great emphasis on the fact that the elder Cosmi had been recently released from the hospital, and was taken by his son to police headquarters where the two men cooperated in making a photographic identification. From this, the Circuit Court assumed that the elder Cosmi was influenced by his son to such an extent as to render the procedure conducive to irreparable misidentification. To iterate, the ultimate test should be whether or not the witness' identification is reliable. See

Biggers v. Neal, supra. And, in determining that issue, all factors, including whether the identification is corroborated, should be considered.

Under New Jersey law, there is no constitutional right to a lineup. See *State v. Thomas,* 107 *N.J. Super.* 128, 133 (App. Div. 1969); *State v. Matlack,* 49 *N.J.* 491 (1967), *cert.* denied 389 *U.S.* 1009 (1967). The appellant knows of no federal law to the contrary. Although *Biggers v. Neal, supra* (448 *F.* 2d 91), might at first blush appear supportive of such a position, the later cases make clear that Biggers is limited to its particular facts. See *United States es rel. Penachio v. Kropp,* 448 *F. 2d* 111, 113 (6 Cir. 1971), and *Hancock v. Tollett,* 447 *F. 2d* 1323, 1327 (6 Cir. 1971).

Moreover, neither the court below nor this Court should impute bad faith to the State authorities in choosing a photographic identification rather than a corporeal confrontation. There is no indication that the police officer involved intended to circumvent the Wade requirement. Moreover, there was no exploration as to the reasons for failing to hold a lineup. No one was ever asked. Although the Court below "did not reach" the issue of whether a lineup is a constitutional necessity, the fact that such a procedure was not used apparently weighed heavily on the outcome of the case.

The State further recognizes that the better practice is unquestionably to present the identification procedure to the identifying witness individually. However, there is no constitutional prohibition against having more than one witness at an identification procedure. It is merely one of the totality of the facts to be considered. Thus in *Clemons v. United States, supra* (408 *F.2d* 1230), the court upheld an identification in which the identifying witness was in the company of two other witnesses during the identification confrontation. The witness testified that "we were sitting together and we said it (that's the fellow) together." *Id.* at 1240. Recognizing the limited scope of review, the Clemons court upheld the introduction of the woman's identification testimony. Compare the situation in *Monteiro v. Picard,* 443 *F. 2d* 311 (1 Cir. 1971), with that in Clemons and the case at bar.

Considering the foregoing, it is submitted the Court's conclusion that the son actually chose the photograph of Thomas for

the father is not supported by the record. The statements made by Edward Cosmi to his father at the time of the photographic identification did not have the capacity to deny petitioner due process of law. In concluding that the photographic identification procedure was unduly suggestive, the Court below evidently relied on the following testimony of the elder Cosmi:

> Q It was just you (and your son)?
> A Yes.
> Q Was he looking through the pictures with you?
> A Yes.
> Q Was he trying to find the picture, also?
> A We decided this is the man or something.
> Q The two of you decided that this was the man, this was after you looked at about fifty pictures?
> A Yes, Sir.
> * * *
> Q Mr. Cosmi, now, back in the police headquarters when you were identifying pictures, you indicated before that you looked at approximately fifty pictures before you found the one that we have here today?
> A Yes.
> Q Who was the first to pick out that picture?
> A My son.
> Q Your son was the first one to pick out that picture?
> A Yes.
> Q Then what did he do? Did he hand it to you?
> A Yes. He said, "You think this is the gentleman?"
> I said, "yes."
> Q He said you think this is the guy and you said yes?
> A. (The witness nods his head in the affirmative.)" (Report and Recommendations, Appendix C).

It is submitted that the remark made by the son did not have the capacity to render any identification by the father unreliable. The son did not make an unequivocal identification in the presence of his father. Compare *Monteiro v. Picard, supra* Rather, he asked whether his father thought the particular

photograph depicted one of the perpetrators of the robbery.[2]

Several other cases have considered the significance of isolated remarks made during the course of an identification procedure, be it corporeal or photographic. In *Clemons v. United States, supra* (408 *F. 2d* 1230), three witnesses viewed an identification confrontation; it was testified that the women "said ('that's the fellow') together." The court upheld testimony concerning this out-of-court identification. Similarly, in *State v. Walters,* 457 *S.W. 2d*817 (Mo. Sup. Ct. 1970, the comment "is that the one?" made by a police officer was not deemed a violation of due process. Likewise, in *State v. Moore,* 435 *S.W. 2d* 8 (Mo. Sup. Ct. 1968), the remark by a police officer that the person identified "had been sent up for rape for nine years . . ." was not deemed unduly suggestive so as to violate due process. Compare *Foster v. California,* 394 *U.S.* 440 (1968), where "(i)n effect, the police repeatedly made obvious to the witness that 'this is the man.' " (emphasis supplied) *Id.* at 443. In *Foster,* the initial lineup arranged by the police in which the petitioner was physically emphasized did not lead to a positive identification; the police then permitted a one-to-one confrontation. Even after this procedure the witness' identification was only tentative. Another lineup was arranged in which Foster was the only person present who had participated in the first lineup. This finally produced a definite identification. This Court held in a five to four decision, that this repetitious singling out of the accused violated due process.

Finally, the State submits that John Cosmi's use of the term "we" at times when testifying concerning the photographic identification, does not detract from the fact that he did make an identification of defendant in a procedure that did not *per se* violate due process. The fact that the witness perhaps informally consulted with his son goes to the weight given his testimony and not its admissibility. All the "defects" inherent in John Cosmi's ability to observe the robbers at the time of the crime, his photographic identification of Clay Thomas, as well as his in-court identification were carefully scrutinized through cross-

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[2]The record is uncertain as to who actually chose Thomas' photograph first. John Cosmi testified that it was he who had chosen the picture first; he later testified that his son may have picked the picture out; the witness also testified that his identification of the photograph was simultaneous to his son's.

examination; all inconsistencies were brought to the attention of the jury. The reliability of this testimony was a question solely within the province of the ultimate fact-finders.

Moreover, even if John Cosmi's identification of Thomas could be considered as idefinite, his testimony was properly admitted as corroborative of the other evidence in the case. In *United States v. Peterson*, 435 *F. 2d* 192 (7 Cir. 1970), the court permitted identification testimony by an eyewitness who readily admitted that his identification was not positive. Rather, the witness identified Peterson as looking like the robber ("somebody who looks like somebody"), "but couldn't swear" to it. The court held that his testimony was not utterly lacking in probative value. It tended to corroborate other evidence adduced by the prosecution. It should be noted that in *Peterson*, this witness was the only eyewitness presented by the prosecution.

POINT III

ASSUMING THAT THE PHOTOGRAPHIC IDENTIFICATION RAISES CONSTITUTIONAL QUESTIONS, THE RECORD BELOW IS INSUFFICIENT FOR RESOLUTION OF THESE ISSUES ADVERSE TO THE PROSECUTION.

The State respectfully submits that the Circuit Court erred in determining, on the basis of the record, that the pre-trial photographic procedure through which John Cosmi made his identification of defendant violated due process of law.

The Federal District Court considered that the elder Cosmi's identification testimony was often couched in terms of "we," referring to John and his son, rather than in terms of the first person pronoun "I." Apparently, the Circuit Court, on this basis, concluded that the son in fact chose the photograph of Thomas from the photo spread. The record reflects that the elder Cosmi was not an articulate individual. The significance of his use of the term "we" at times and "I" at others could be determined only by the witness himself. Such an indication is lacking in the record.

Moreover, the effect of the son's presence and remarks on the ability of John Cosmi to individually identify defendant was never adequately explored. The trial court did not deem the "irregularity" to be of significant magnitude to warrant inquiry. Apparently, both the trial prosecutor and defense counsel agreed. Therefore, assuming that the presence of and comment by the son were sufficient to violate due process under certain circumstances, a remand should be ordered to determine whether the impact of these factors could render the identification procedure so unnecessarily suggestive as to give rise to a very substantial likelihood of misidentification by John Cosmi. The question is, whether, as a result of this procedure, the elder Cosmi's identification was unreliable.

Furthermore, the circumstances surrounding the failure of the police to stage a lineup rather than to present a photographic identification procedure has never been explored. It might well be that Thomas was unavailable for a physical confrontation at the time, thereby explaining the substitution of a photographic identification procedure for that of a lineup. To the extend that the

Circuit Court's conclusion was influenced by the State's failure to provide a lineup procedure, it was improper.

Therefore, it is respectfully submitted that there could be no determination adverse to the prosecution on the basis of the record presented. It would be unreasonable to draw inferences adverse to the State as to the above mentioned factors without affording the State any opportunity to present mitigating evidence.

CONCLUSION

For the foregoing reasons, petitioner prays that his petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit be granted.

Respectfully submitted,

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Deputy Attorney General
On the Petition.

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-1361

UNITED STATES OF AMERICA
EX REL. CLAY THOMAS

vs.

STATE OF NEW JERSEY AND HOWARD YEAGER, PRINCIPAL KEEPER OF THE NEW JERSEY STATE PRISONS, AND U. SAMUEL VUKCEVICH, SUPERINTENDENT OF THE NEW JERSEY STATE PRISON AT RAHWAY, NEW JERSEY,
Appellants

(D. C. Civil Action No. 851-71)

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present: VAN DUSEN, GIBBONS and HUNTER, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed March 7, 1972, as amended by order filed April 10, 1972, be, and the same is hereby affirmed insofar as the said judgment of the said District Court granted the writ of habeas corpus and ordered the petitioner's enlargement from State custody pending the State's appeal. Those parts of the said order of the said District Court which directed that the Passaic County Court fix bail and which directed that the Clerk of the Passaic County Court accept

from petitioner a personal recognizance bond in the amount of $25,000.00, be, and the same are hereby vacated, and the cause remanded to the said District Court for furthering proceedings in accordance with the opinion of this Court.

ATTEST:

Thomas Quinn
Clerk

January 23, 1973

APPENDIX "B"

UNITED STATES COURT OF APPEALS
For The Third Circuit

No. 72-1361

UNITED STATES OF AMERICA EX REL. CLAY THOMAS

v.

STATE OF NEW JERSEY AND HOWARD YEAGER, PRINCIPAL KEEPER OF THE NEW JERSEY PRISON, AND U. SAMUEL VUKCEVICH, SUPERINTENDENT OF THE NEW JERSEY STATE PRISON AT RAHWAY, NEW JERSEY,
Appellants.

(D.C. Civil Action No. 851-71)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

STANLEY C. VAN NESS, Public Defender,
THOMAS E. BRACKEN, Assistant Deputy Public Defendant, Newark, New Jersey,
Attorneys for Appellee

GEORGE F. KUGLER, JR., Attorney General,
ALFRED J. LUCIANI, Deputy Attorney General,
Trenton, New Jersey, Attorneys for Appellants

Argued December 4, 1972
Before VAN DUSEN, GIBBONS and HUNTER, Circuit Judges

OPINION OF THE COURT
(Filed JAN. 23, 1973)

GIBBONS, Circuit Judge

This is an appeal by the State of New Jersey from an order granting a petition for a writ of habeas corpus. The basic order appealed from provides:

> "ORDERED that a writ of habeas corpus shall issue.
>
> Further ORDERED that pending appeal, if any is taken by the State, or pending retrial, the Passaic County Court entertain an application by petitioner for bail to be fixed by the State Court in such amount and such form as may be deemed reasonable.
>
> Further ORDERED that in the event an appeal is not taken by the State and the indictment is not moved for retrial within 60 days of the date hereof, petitioner shall be released from all further custody pursuant to the indictment."

Upon the entry of this order Thomas, the petitioner, applied to the Passaic County Court to be released on bail. That court declined to entertain such an application. Thomas returned to the district court, which then amended the basic order to provide that he should be released upon posting his own personal unsecured bond in the amount of $25,000 with the Passaic County Court. It directed that the Clerk of the Passaic County Court accept such bonds, and that upon its posting, Thomas be released from further custody pending disposition of the instant appeal.

The state's appeal urges

(1) that the district court's decision that a writ of habeas corpus

should issue was error, and

(2) that the district court was without power:

(a) to order a habeas corpus petitioner's release from state custody pending appeal, or

(b) to direct that the Passaic County Court fix the amount of bail or accept a bond in an amount fixed by the district court.

The Grant of Habeas Corpus

The district court's decision that the writ should issue was made, on the basis of the state court record without an evidentiary hearing, on the ground that identification evidence used at the trial violated due process. Thomas urged as an additional ground for granting the writ that the state trial court had coerced a verdict by use of an *Allen* charge. The district court did not regard this charge as an error of constitutional dimensions. But the court did point out that the necessity for the charge, i.e. the fact that the jury was unable to agree, tended to show that the identification errors could not, under *Harrington v. California*, 395 U.S. 250 (1969), and *Chapman v. California*, 386 U.S. 18 (1967), be regarded as harmless. Having examined the transcript of the state court trial, we affirm the order granting the writ.

The indictment on which Thomas was tried grew out of the robbery on March 22, 1968, by two Negro males of a real estate office conducted by Edward Cosmi. His father, John Cosmi, was also in the office that evening. The district court held that due process violations occurred in the admission into evidence of testimony by John Cosmi (1) as to a pre-trial photographic identification of Thomas and (2) as to an in-court identification of Thomas.

The state's basic contention is that the ruling of the state trial judge admitting evidence of the challenged pre-trial photographic identification by John Cosmi was a determination of a factual issue within the meaning of 28 U.S.C. § 2254(d), and hence presumptively correct unless one of the eight exceptions set forth in § 2254(d) applies. But the determination that evidence of the challenged pre-trial photographic identification was admissible was at best a ruling on a mixed question of law and fact. As the Supreme Court observed in *Townsend v. Sain*, 372 U.S. 293, 309 n.6 (1963):

> "By 'issues of fact' we mean to refer to what are termed basic, primary, or historical facts: facts 'in the sense of a recital of external events and the credability of their narrators . . . .' *Brown v. Allen,* 344 U.S. 443, 506 (opinion of Mr. Justice Frankfurter). So-called mixed questions of fact and law, which require the application of a legal standard to the historical-fact determinations, are not facts in this sense."

Whether a pre-trial identification has been conducted in an impermissibly suggestive manner, and, hence, is inadmissible is, to be sure, in one sense a question of fact. But it is a question to be determined by applying to a given collection of historical facts a defined legal standard. That defined legal standard is, moreover, a federal standard. Review by a federal habeas corpus court of a determination reflecting the application of a federal legal standard to historical facts is not barred by 28 U.S.C. § 2254(d). The most common instance of federal review of such mixed questions of historical fact and legal standard is federal review of the voluntariness of confessions. Perhaps the classic statement of the rule appears in *Watts v. Indiana,* 338 U.S. 49, 50 (1949):

> "On review here of State convictions, all those matters which are usually termed issues of fact are for conclusive determination by the State courts and are not open for reconsideration by this Court. Observance of this restriction in our review of State courts calls for the utmost scruple. But 'issue of fact' is a coat of many colors. It does not cover a conclusion drawn from uncontroverted happenings, when that conclusion incorporates standards of conduct or criteria for judgment which in themselves are decisive of constitutional rights. Such standards and criteria, measured against the requirements drawn from constitutional provisions, and their proper applications, are issues for this Court's adjudication."

See also Darwin v. Connecticut, 391 U.S. 346 (1968); *Greenwald v. Wisconsin,* 390 U.S. 519 (1968); *Clewis v. Texas,* 386 U.S. 707 (1967). Each of these cases, like *Watts v. Indiana, supra,* arose under the Supreme Court's certiorari jurisdiction to review final state court action, and thus, technically, none is a construction of 28 U.S.C. § 2254(d). But *Townsend v. Sain, supra,* makes clear that a habeas corpus court must observe the same mixed question of fact and law distinction as does the Supreme Court on cer-

tiorari from a state court. And § 2254(d) is no more than a codification of the standards announced by the Court in that case.[1] The Court implicitly recognized as much when, in *Frazier v. Cupp*, 394 U.S. 731, 739 (1969), a habeas corpus case, it made its own independent determination that a confession was voluntary, and in *Procunier v. Atchley*, 400 U.S. 446 (1971), another habeas corpus case in which it independently reviewed the state court record and concluded that the California courts ". . . gave full consideration to the issue of voluntariness of the respondent's statement, and that they applied correct standards of constitutional law in upholding its admission in evidence." 400 U.S. at 454.[2] Indeed, *Stovall v. Denno*, 388 U.S. 293 (1967), which for present purposes is most closely in point, is a habeas corpus case in which, after the 1966 amendments to 28 U.S.C. § 2254, the Court, acting on the basis of the state court record, made its own determination of a mixed question of law and fact—whether the pre-trial identification procedure employed was so impermissibly suggestive as to bar testimony at the trial with respect to it. The district court here did the same, though it reached an opposite conclusion on the merits. *Stovall v. Denno, supra*, makes clear that jurisdiction to do so is not eliminated by 28 U.S.C. § 2254(d).[3]

A somewhat different issue is presented with respect to the district court's ruling that the admission of John Cosmi's in-court identification testimony was a due process violation. Assuming a pre-trial identification procedure so impermissibly suggestive as to violate due process, the witness who has been subjected to such

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[1]"Congress in 1966 amended 28 U.S.C. § 2254 (see 1964 ed., Supp. V), so as substantially to codify most of the habeas corpus criteria set out in *Townsend v. Sain*. Procunier v. Atchley, 400 U.S. 446, 451 n.6 (1971).

[2]In United States ex rel. Dickerson v. Rundle, 430 F.2d 462 (3d Cir. 1970), *cert. denied*, 408 U.S. 928 (1972), this court, similarly, reviewed a state court record and made an independent determination of such a mixed question of law and fact.

[3]If we were compelled to read the words "factual issue" in § 2254(d) as broadly as the state urges, we would in any event hold that on consideration of ". . . that part of the record of the State court proceeding in which the determination of such factual issue was made, . . . such factual determination is not fairly supported by the record." 28 U.S.C. § 2254(d) (8).

a procedure may not make an in-court identification unless the state establishes by clear and convincing evidence that the in-court identification has an origin independent of the illegal pretrial identification procedure. *Gilbert v. California*, 388 U.S. 263 (1967); *United States v. Wade*, 388 U.S. 218 (1967); *United States v. Zeiler*, 447 F.2d 993 (3rd Cir. 1971) (Zeiler II).[4] It may be argued that since the question of "taint" of the in-court identification will often involve credibility judgments, the decision of that issue is more closely a pure question of fact than a mixed question of fact and law. However, our *Zeiler II* opinion, inferentially at least, treats the issue as one calling for the application of federal legal standards to historical facts. We do not in this case reach the application of § 2254(d) to the "taint" issue, however, for here the state concedes:

> "The State submits that the trial court never reached the issue of taint. Rather, it considered only whether the photographic identification procedure was so unnecessarily suggestive to the identifying witness as to give rise to a very substantial likelihood of misidentification. The trial court found that the procedure did not possess that capacity, and therefore permitted the introduction of testimony relating to it . . . . Once the court determined that this identification testimony was admissible, it had no occasion to consider the adjunct question of taint. These conclusions were affirmed by trhe Appellate Division." (Appellants' Brief at 22).

The state court record bears out this concession. Thus, assuming, as the district court held, that the photographic identification to which John Cosmi had been subjected was illegally suggestive, the state court record simply contains no finding to which, under § 2254(d), deference might be owed. The state court record establishes that the trial court admitted John Cosmi's in-court identification without the federally required finding, by clear and

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[4]United States ex rel. Reed v. Anderson, 461 F.2d 739 (3d Cir. 1972) made no change in this rule. It merely made inapplicable to photographic identifications the per se prophalactic presence of counsel rule announced in United States v. Wade and Gilbert v. California for corporeal identifications (lineups).

convincing evidence, of freedom from taint.

Thus, the state's position on appeal from the order granting the writ depends entirely upon the suggestibility of the pre-trial photographic identification procedure to which John Cosmi was subjected. If, on the merits, the district court correctly held that it was unduly suggestive, it falls, and the in-court identification on this record falls with it.

We reject, as well, the state's contention that the district court erred in ruling that John Cosmi had been subjected to an unduly suggestive pre-trial photographic identification. The indictment, as we pointed out above, grew out of the March 22, 1968 robbery by two Negro males of a real estate office conducted by Edward Cosmi. John Cosmi, age 69, was there at the office assisting his son. During the robbery he had very little opportunity to observe the perpetrators because at first he was in a back room, and moments after he came in contact with them a blow rendered him unconscious. His testimony about his observations at the time of the robbery is hardly clear and convincing. He was hospitalized after the robbery, and thereafter suffered from dizziness.

On March 23, 1968, Edward Cosmi went through a collection of mug shots and picked out a photograph which proved to be that of Thomas. Thomas was arrested on Sunday evening, March 24, 1968. At 2:30 A.M. on March 25, Edward Cosmi was invited to police headquarters, where he identified Thomas. Thomas was shown to Edward Cosmi singly in a room full of white detectives. The trial court would not permit testimony by Edward Cosmi about the March 25, 1968 identification at the police headquarters, but over objection did permit Edward Cosmi to identify Thomas in court and permitted testimony about his earlier photographic identification.[5] After the March 25 identification at the police station by Edward Cosmi, a criminal complaint was signed, and Thomas was continued in custody.

On March 27, John Cosmi, who had been released from the hospital the day before, was taken to the police station by his son Edward. Although Thomas has been charged, was in custody, and thus was available for a corporeal lineup, none was held. In-

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[5] Prior to appellee's sentencing, Edward Cosmi recanted his identification in an affidavit which was filed in support of a motion for a new trial. That motion was withdrawn in consideration of a dismissal of an earlier indictment.

stead, John, in Edward's presence, was shown a collection of photographs. He testified that his son picked out a photograph and asked him if this was one of the men, and he agreed. (N.T. 1-54, 3-18). Evidence of this out-of-court identification was permitted over objection at the state court trial. The district court held that the procedure employed was so unduly suggestive as to violate due process.

In *Simmons v. United States*, 390 U.S. 377, 384 (1968), the Court held:

> "... that convictions based on eyewitness identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."

While an adult son takes his recently injured and dazed father virtually from a hospital bed to the police station, and there picks out for him a photograph of a person whom the son has previously identified, the procedure employed involves a substantial likelihood of misidentification. The father obviously was aware of the prior identification, of his own limited opportunity to make an observation, and of the son's greater opportunity to do so. The record discloses the complete absence of any precautions against suggestibility and the presence of several factors tending to create the likelihood of misidentification. Thus, we agree with the district court that the pre-trial photographic identification procedure to which John Cosmi was subjected on March 27, 1968, did not meet minimum due process standards. The trial court committed error of constitutional dimensions in permitting evidence of the March 27, 1968 photographic identification for the truth of the matter asserted, and in permitting the witness to make an in-court identification without first finding by clear and convincing evidence that the in-court identification had an independent source.

One other point strenuously urged by the state bears mentioning. It is contended that because at the police station on March 27, 1968, Edward Cosmi, rather than a police officer, picked out Thomas' photograph, the suggestiveness in no way involved state action, and hence in no way implicated the fourteenth amendment. This argument is a bit wide of the mark, for the due

process violation occurs not when the suggestive identification procedure occurs, but when it, or its fruits, is used as evidence against a defendant in a trial. But aside from this obvious point, the record here discloses that the police were involved in the impermissible identification procedures. Indeed, Thomas urges that the use of a photographic lineup after he was charged with a crime, while he was in custody and available for a corporeal lineup was a device whereby the police circumvented the presence of counsel rule. *United States v. Wade, supra; Gilbert v. California, supra; cf. Kirby v. Illinois,* 406 U.S. 682 (1972). The district court did not reach that issue, nor, on this record, do we.

Thomas contends that use of the *Allen* charge was an additional ground for issuing the writ. In *United States v. Fioravanti,* 412 F.2d 407, 420 (3rd Cir.), *cert. denied,* 396 U.S. 837 (1968), we prohibited, prospectively, use in the federal courts of this circuit of this somewhat coercive method of encouraging resolution of jury deadlocks. *See also United States v. Burley,* 460 F.2d 998 (3rd Cir. 1972). We did not, however, lay down a rule of constitutional law. Unless the Supreme Court sees fit to reconsider *Allen v. United States,* 164 U.S. 492 (1896), the state courts remain free to rely upon it. We place no more significance on the use of a charge patterned on that case than did the district court. The necessity for its use is, as the district court suggested, some indication that had the identification evidence of John Cosmi been excluded, a not-guilty verdict might have resulted.

Thomas' Release Pending Appeal

The state also urges that the district court lacked the power (a) to order Thomas' enlargement from state custody pending appeal, and (b) to direct that the Passaic County Court (1) fix the amount of bail during such enlargement or (2) accept a personal recognizance from Thomas in an amount fixed by the district court as security during such enlargement. These issues are not moot, since the period of Thomas' enlargement between the time our mandate reaches the district court and the time of any state court retrial may be considerable, and since a petition for certiorari is possible. During these periods the only bond securing his appearance at a retrial, if we do not act on this aspect of the state's appeal, would be that which the district court ordered.

We hold (a) that the district court did have the power to order Thomas' enlargement from state custody pending appeal, but (b) that it lacked authority to direct the Passaic County Court either (1) to fix an amount of bail during such enlargement, or (2) to accept any bail bond, secured or unsecured, from Thomas.

Substantial confusion has arisen in this case and in other habeas corpus cases from the reference by counsel for the petitioner or the respondent or both to an enlargement of a habeas corpus petitioner on "bail". The standards for release and for bail set forth in 18 U.S.C. §§ 3141-3152 and Rule 46, Fed. R. Crim. P., and the cases construing these provisions, are irrelevant to the release by federal courts of state prisoners. They deal with federal criminal proceedings only. The only authority for the release by a federal court of a state prisoner is the habeas corpus statute, 28 U.S.C. SS 2241-2255.* Habeas corpus is a civil proceeding. "Bail", which has a criminal connotation, is a misnomer in a habeas corpus case, and neither the habeas corpus statute nor applicable court rules use the term. The power to enlarge a state prisoner at any time before a habeas corpus judgment becomes final, then, exists, if at all, as a part of the courts' habeas corpus jurisdiction.

Where a state prisoner has obtained from a district court a decision that his state confinement is unlawful, he is entitled to an order that such confinement be ended. The district court's final order may be in one of two forms. It may unconditionally order the prisoner's release, or it may order his release at some time in the near future if, in the meantime, he has not been afforded a new trial. Either form of order is appealable. In the typical new trial type order, such as is here appealed from, the time fixed for a new trial will be considerably shorter than the time periods fixed in the Federal Rules of Appellate Procedure for docketing, briefing and arguing an appeal. Thus, either type of order, if the state appeals, will present the issue of custody of the petitioner pending appeal. The practice in such cases is governed by Rule 23(c) Fed. R. App. P.:

> "Pending review of a decision ordering the release of a prisoner in such a proceeding, the prisoner shall be

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* And possibly in rare instances the Civil Rights Acts, 28 U.S. C. § 1343, 42 U.S.C. § § 1983 et seq.

> enlarged upon his recognizance, with or without surety, unless the court or justice or judge rendering the decision, or the court of appeals or the Supreme Court, or a judge or justice of either court shall otherwise order."

An understanding of the full import of Rule 23(c) requires some knowledge of its history. The equivalent of that rule has been in effect since at least 1886. In that year the Supreme Court adopted a rule:

"*Ordered*, That the following regulations be established under section 765 of the Revised Statutes:

RULE 34.

CUSTODY OF PRISONERS ON HABEAS CORPUS.

* * *

> 3. Pending an appeal from the final decision of any court of judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required." 117 U.S. 708.

This rule or its equivalent has been a part of the rules of the Supreme Court ever since. Its present equivalent is Rule 49(3) of the Supreme Court Rules. The reference to Revised Statutes, § 765 is to the statute which gave the Supreme Court general authority to regulate habeas corpus proceedings, including regulations "for the custody and appearance of the person alleged to be restrained of his or her liberty." Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385. Rule 34 became Rule 42 in the 1925 Rules, 266 U.S. 685, Rule 45 in the 1928 Rules, 275 U.S. 629, and Rule 49 in the 1954 Rules, 346 U.S. 999. Revised Statutes, § 765 was repealed in the 1948 revision of title 28, but the statutory authority for Rule 49(3) of the Supreme Court Rules cannot be doubted. *See* 28 U.S.C. § 2071 (rule making); 28 U.S.C. § 210 (f) (stays); 28 U.S.C. S 2251 (stays in habeas corpus cases); 28 U.S.C. S 1651 (all writs).

When in 1967 the Supreme Court promulgated the Federal Rules of Appellate Procedure, it included in Rule 23 a rule identical in language with its own Rule 49. Thus, Rule 23(c) is in direct succession from the original Supreme Court Rule 34(3) adopted in 1886. Even though until 1967 it appeared in the Supreme Court rules, at all times it has dealt with the duty of the district courts in habeas corpus cases. In 1886 the language requiring the enlargement of the successful habeas corpus petitioner was mandatory. The only discretion was in deciding whether a surety on his recognizance ought to be required. The mandatory language with respect to enlargement of the successful petitioner was carried forward until 1967. In that year, however, Rule 49(3) was revised to provide that the successful petitioner "shall be enlarged upon his recognizance, with or without surety, unless the court or justice or judge rendering the decision, or the court of appeals or this court, or a judge or justice of either court, shall otherwise order." The revised language was carried into Rule 23(c), Fed. R. App. P.

Thus from 1886 to 1967 a judge granting habeas corpus relief was under a flat mandate to enlarge the petitioner pending appeal. In *United States ex rel. Collins v. Claudy*, 204 F.2d 624 (3d Cir. 1953) this court, reversing the denial of a habeas corpus petition and ordering that the writ issue, recognized that the state might seek a reversal in the Supreme Court. It held, therefore,

> ". . . we will entertain a request for the enlargement of the petitioner on bail pending final disposition of this case if any further proceedings shall postpone the issuance of the mandate of this court in normal course. See our Rule 15(3); Supreme Court Rule 45(3)." 204 F.2d at 630.

Since 1967 an order such as was entered in the *Collins* case would not be mandatory. But it is clear from the history of the rule prior to the 1967 change that there is still a very strong presumption that a petitioner holding a final judgment that his detention is unlawful should not be left in state custody. The 1967 change was not intended to adopt a general rule in favor of custody pending appeal, but only to substitute discretion, to be exercised in limited situations, for what was formerly a mandatory release requirement. *See* B. Bosky and E. Gressman, *The 1967 Changes*

in the Supreme Court's Rules, 42 F.D.R. 139, 161 (1967).[7] There is no question, then, that the district court had the power to order Thomas' enlargement from state custody pending the state's appeal.

But the recognizance referred to in the 1886 rules is a recognizance to answer to the judgment of the federal court on appeal, and although Rule 23(c) no longer contains the express language "for appearance to answer the judgment of the appellate court", no change in substance was intended. In particular, it was not intended that the district courts could require either that the state courts accept or that a petitioner give recognizance to the state rather than the federal court. Indeed, it may be doubted whether such a rule would be within the rule-making power of the Supreme Court, since it is nowhere authorized by the habeas corpus statute. The habeas corpus court by its writ requires that the respondent be delivered up to its custody. It may at some point conclude that state custody should be restored, and it is naturally interested in the availability of the petitioner to respond to its judgment. Thus, any recognizance, with or without surety, must in a habeas case run to and be filed with the federal court. This is true not only in the situations where, pending appeal, disposition must be made pursuant to Rule 23, Fed. R. App. P., for the custody of the petitioner, but in situations where pending conclusion of a habeas corpus hearing the federal court may conclude that continued state custody is inappropriate. *See Johnston v. Marsh*, 227 F. 2d 528 (3d Cir.

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[7] There is a line of cases which suggests that the so-called "conditional" grant of the writ, ordering that the prisoner be released unless the state re-tries him in a specified period, is not a "decision ordering the release of a prisoner" within the meaning of Supreme Court Rule 49(3). The leading case is O'Brien v. Lindsey, 202 F.2d 418 (1st Cir. 1953). *Accord* Lewis v. Henderson, 356 F. 2d 105 (6th Cir. 1966); United States ex rel. Calhoun v. Pate, 341 F. 2d 885 (7th Cir.), *cert. denied*, 382 U.S. 945 (1965); Painten v. Massachusetts, 254 F. Supp. 246 (D.Mass. 1966), *aff'd*, 368 F. 2d 142 (1st Cir. 1966), *cert. granted*, 386 U.S. 931 (1967), *cert. dismissed*, 389 U.S. 560 (1968). These cases do not hold that enlargement is improper under such an order, but only that during the time period granted the state the mandatory language of the rule as it existed prior to 1967 is inapplicable. All are pre-1967 cases and all are obsolete by virtue of the 1967 amendment to Rule 49(3) giving the district court discretion.

1955). It is true, as well, where the district court order is conditioned upon a retrial, but the district court concludes that enlargement is proper.

Thus, the district court order, to the extent that it directed the Passaic County Court to fix bail, and to the extent that it directed the Clerk of the Passaic County Court to accept a personal recognizance in an amount fixed by the district court, was in error.

The judgment of the district court granting the writ of habeas corpus and ordering the petitioner's enlargement from state custody pending the state's appeal will be affirmed. Those parts of the order appealed from which directed that the Passaic County Court fix bail, and which directed that the Clerk of the Passaic County Court accept from petitioner a personal recognizance bond in the amount of $25,000 will be vacated and the case will be remanded to the district court for a prompt hearing on notice to the petitioner at which the district court will determine the amount of any recognizance and the surety, if any, on any recognizance, which shall be required by the district court to assure (1) the petitioner's compliance with any district court order with respect to his availability to the State of New Jersey for a retrial on the indictment here involved, and (2) the petitioner's compliance with any judgment which may be rendered by the Supreme Court.

TO THE CLERK OF THE COURT

Please file the foregoing opinion.

Circuit Judge

APPENDIX "C"

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA
ex rel. CLAY THOMAS, **Civil No. 851-71**

Petitioner,

MEMORANDUM and ORDER

v.

STATE OF NEW JERSEY and HOWARD YEAGER, PRINCIPLE KEEPER OF THE NEW JERSEY STATE PRISONS, and U. SAMUEL VUKCEVICH, SUPERINTENDENT OF THE NEW JERSEY STATE PRISON AT RAHWAY, NEW JERSEY,

Respondents.

Petitioner Clay Thomas filed a petition herein seeking the issuance of a writ of habeas corpus pursuant to the provisions of 28 U.S.C. 2241 (c) (3). The petition was referred to the Honorable John W. Devine, United States Magistrate, pursuant to our General Rule 40E (3) for report and recommendation. The Court adopts the recommendation of the Magistrate that the writ issue. The facts are stated accurately in the report of the Magistrate and need not be repeated here. (Copy attached).

Independent review of the record by the Court satisfies it that there was error of constitutional dimension in the trial and conviction of petitioner. Upon its own independent review of the record, the Court supplements the report of the Magistrate with the following observations:

The jury, after deliberating for a period of five hours, could not reach agreement. When this was reported to the trial judge he inquired of the jurors whether they might be able to reach agreement if they took a little more time to deliberate. While the

ultimate response was in the affirmative, the record discloses doubt on the part of the jurors that a unanimous verdict could be reached. It may be inferred from the colloquy between the trial court and the forelady of the jury that the disagreement among the jurors was of such nature that it was doubtful whether further deliberations would result in a unanimous verdict. It is in this context that remarks of the trial judge, in his supplemental instructions, may have injected into the deliberations an improper element to influence their thinking. The trial judge stated in part:

> We want to expeditiously dispose of a back log of criminal cases. * * * * An agreement upon a verdict is desirable and important towards the disposition of this case and for the general expeditious administration of criminal causes.

It is true that the trial judge cautioned the jurors not to compromise or to yield a conscientious opinion merely to achieve unanimity in reaching a verdict. But it is not unreasonable to infer that, against a background of highly publicized congestion of litigation in the State courts and the impact on the administration of criminal justice, the reference to expeditious disposition of the case may have had persuasive effect, causing the jurors to resolve their differences, after hopeless deadlock, within the short period of forty-five minutes.

If the above mentioned remarks of the trial judge were the only error, it must be conceded that the question of harmless error would be debatable. The Court merely treats the remarks of the trial judge in his supplemental instruction to the jury as a conceivable contributing factor to the short period of final deliberation by the jurors during which they reached unanimous agreement on a verdict of guilty.

More significant is the in-court identification by one of the victims, John Cosmi, which was undoubtedly tainted by the assistance of the other victim, Edward Cosmi. John Cosmi and Edward Cosmi are father and son. The opportunity of John Cosmi to view the petitioner at the time of the robbery was very limited. He was taken to police headquarters and examined approximately 50 photographs with his son, Edward Cosmi, at his side. It is apparent from his testimony that it was his son, Edward, who made the photographic identification which the father

adopted. There is no doubt that the in-court identification had been impermissibly tainted.

While it might be argued that since the in-court identification by Edward Cosmi was not impermissibly tainted by any pretrial procedures, except the possibility of the single line-up in which the petitioner was the only Negro, the testimony of the father, John Cosmi, was merely cumulative. This focuses attention on the harmless error rule, and the question of harmless error must be evaluated in the light of the totality of the circumstances.

After the forelady announced disagreement following five hours of deliberations, she indicated that she had doubt as to whether there was any possibility of reaching agreement. The pertinent responses to the court are quoted as follows:

> THE COURT: The court officer in charge of the jury informed the court that the jury is unable to agree upon a verdict. Will Mrs. Booth, the forelady, kindly rise. Is that correct?
>
> MRS. BOOTH: Yes, it is.
>
> THE COURT: Will some additional time be productive of a depositive (sic) verdict?
>
> MRS. BOOTH: I don't know.
>
> THE COURT: Well, what is your view and opinion? That if the court were to give the jury additional time, does it look probable that—reasonably probable that a depositive (sic) verdict, in whatever form, will be rendered by the jury?
>
> MRS. BOOTH: I don't think so.
>
> THE COURT: Would you say that you were hopelessly deadlocked?
>
> MRS. BOOTH: The way it is now.

Further interrogation finally developed the affirmative response that more time might dispose of the case.

Reliable identification of petitioner was the crucial evidence essential to conviction. There was no dispute about the fact that the offense of armed robbery had been committed. The main thrust of the defense was that petitioner had not been a participant. Hence, it is not unreasonable to reach the conclusion that during the first round of deliberations the jurors had difficulty resolving the issue of identification. The cumulative identification testimony of John Cosmi may well have been the deciding factor in the ultimate verdict. Of course, it is impossible to state with certainty what occurred in the jury room during the forty-five minutes it took to resolve the disagreement. The test, however, to be applied is whether or not it is reasonably conceivable the the cumulative identification testimony of John Cosmi may have tipped the scale. If it had that potential, there was harmful error beyond a reasonable doubt. See *Chapman v. California*, 386 U.S. 18 (1967). Since the cumulative testimony of John Cosmi was improperly admitted in evidence and could have had the effect of breaking a hopeless deadlock among the jurors, it follows that the admission of such evidence was harmful error which deprived petitioner of due process and entitled him to a new trial.

The issuance of a writ will leave the indictment open subject to retrial with the usual incident of bail. In the event that this decision becomes final, because of the failure of the State to prosecute an appeal, the State shall move the indictment for retrial within a period of 60 days.

Petitioner has moved before this Court to be released on bail. Pending appeal, if any is taken, and pending retrial, petitioner is entitled to have bail fixed in such amount and form as may be deemed reasonable by the State Court.

Accordingly, it is on this 6th day March, 1972, ORDERED that a writ of habeas corpus shall issue.

Further O R D E R E D that pending appeal, if any is taken by the State, or pending retrial, the Passaic County Court entertain an application by petitioner for bail to be fixed by the State Court in such amount in such form as may be deemed reasonable.

Further O R D E R E D that in the event an appeal is not taken by the State and the indictment is not moved for retrial within 60 days of the date hereof, petitioner shall be released from all further custody pursuant to the indictment.

ROBERT SHAW U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 851-71

UNITED STATES OF AMERICA ex rel. CLAY TH OMAS,

Pei ioner,

v.

STATE OF NEW JERSEY, et al

MEMORANDUM and ORDER

ROBERT SHAW
U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
DOCKET NO. C. 851-71

Civil Action
(On Petition for Writ of Habeas Corpus)

UNITED STATES OF AMERICA
ex rel.
CLAY THOMAS,

REPORT AND RECOMMENDATION

PETITIONER

V.

STATE OF NEW JERSEY et al,
RESPONDENT

Clay Thomas attacks his present confinement in a petition for habeas corpus. 28 U.S.C.A. S 2241 et seq. That petition has been referred pursuant to our General Rule 40E (3).

By Passaic County Indictment 554-67 petitioner and a John Doe were charged with armed robbery. Petitioner was tried and convicted by a jury on July 11, 1968. He was sentenced in the aggregate to seven to nine years. His appeal was unsuccessful *State v. Thomas*, Docket No. A 591-68, decided July 7, 1970 in an unpublished per curiam opinion. The State Supreme Court denied certification. 57 N.J. 639 (1970). An application for reduction of sentence was denied on November 30, 1970. The instant petition followed.

Petitioner has exhausted his state remedies. 28 U.S.C.A. S 2254 (b). *Fay v. Noia*, 372 U.S. 391 (1963).

On Friday evening, March 22, 1968, Edward Cosmi and his 69 year old father, John Cosmi, were at the former's business establishment, the cosmi Real Estate Agency. At about 8:00 P.M. two male Negroes entered and were greeted by Edward with whom they had a brief conversation which culminated in the assailants brandishing revolvers and ordering him into a rear room where his father was then engaged. Mr. Cosmi, a tailor by avocation, assisted his son on an informal basis.

The elder Cosmi tried to make a telephone call but was struck by one of the robbers. He then tried to leave the premises but was again struck, this time on the back of his head with a pistol. He and his son were put in an adjoining bathroom where they remained briefly until the robbers left. Soon after, Mr. Cosmi was taken to a hospital where he stayed for five days. The remaining relevant facts will be recited under the appropriate heading.

I

Petitioner's initial contention is that the identification procedures followed here violated his constitutional rights. There were five such procedures, three out-of-court and two in-court. All but one were testified to before the jury.

(a) The first out-of-court procedure occurred at municipal police headquarters on the night of the crime when Edward Cosmi selected petitioner's photograph from a group of about 18 pictures most of which portrayed a Negro male. This procedure took place before petitioner was in custody, was not, on this record, conducted in such a way as to lead to an irrevocable mistaken identification and was, therefore, not constitutionally deficient *Simmons v. United States*, 390 U.S. 377 (1968). In addition this procedure antedates *Zeiler v. United States*, 427 F. 2d 1305 (3 Cir. 1970) which is to be applied prospectively. *United States ex rel. Wooten v. State of New Jersey*, Civil No. 786-69, decided March 16, 1971, by Chief Judge Augelli.

(b) The second out-of-court identification occurred when Edward Cosmi was brought to police headquarters at about 3:00 A.M. on March 25, 1968 and was shown the petitioner for the purpose of identifying him. Petitioner was then the only Negro in a room otherwise occupied by white people who were apparently police officers. The trial court properly precluded the introduction of that identification. *United States v. Wade*, 388 U.S. 218 (1967); *Stovall v. Denno*, 388 U.S. 293 (1967). The effect of this procedure on Edward Cosmi's in-court identification of petitioner is discussed in (e) below.

(c) The third out-of-court identification was made by John Cosmi. Upon his discharge from the hospital Mr. Cosmi went to police headquarters and examined approximately 50 photographs with his son, Edward, at his side. Mr. Cosmi's identification testimony reveals that he frequently spoke in terms of what "we", referring to his son and himself, did in selecting petitioner's photograph as opposed to what he alone did, although he also used the first person singular in this regard occasionally. Mr. Cosmi had given the police no prior description of the robbers. His most significant testimony on this issue follows:

Q It was just you (and your son)?

A Yes.

Q Was he looking through the pictures with you?

A Yes.
Q Was he trying to find the picture, also?
A We decided this is the man or something.
Q The two of you decided that this was the man, this was after you looked at about fifty pictures?
A Yes, Sir.
* * *
Q Mr. Cosmi, now, back in the police headquarters when you were identifying pictures, you indicated before that you looked at approximately fifty pictures before you found the one that we have here today?
A Yes.
Q Who was the first to pick out that picture?
A My son.
Q Your son was the first one to pick out that picture?
A Yes.
Q Then what did he do? Did he hand it to you?
A Yes. He said, "You think this is the gentleman?" I said, "yes."
Q He said you think this is the guy and you said yes?
A (The witness nods his head in the affirmative.)

Despite Mr. Cosmi's candor the testimony of his out-of-court photographic identification was permitted, over objection. In our view that procedure clearly ran afoul of *Simmons v. United States*, supra, and of *Stovall v. Denno*, supra, which proscribes identification procedures "so unnecessarily suggestive and conducive to irreparable mistaken identification that (petitioner is) denied due process of law." 388 U.S. at 302. In *Simmons* the court had before it photographic identifications made before the defendant was in custody. That the Supreme Court in *Stovall* had before it a corporeal identification does not, in our view, remove non-corporeal identifications from its holding. Cf *Palmer v. Peyton*, 359 F.2d 199 (4 Cir. 1966 and *United States* ex rel. *Lindsey v. Yeager*, Civil No. 334-71, decided August 16, 1971 by Judge Cohen of this district, both of which involved voice identifications. See *United States v. Zeiler*, 427 F.2d 1305 (3 Cir. 1970) which held photographic identifications conducted when an accused is in custody but without his attorney present inadmissable per se. That *Zeiler* is prospective does not render ever post-Wade pre-Zeiler photographic identification immune from

the due process requirements of the constitution[1].

John Cosmi's photographic identification of petitioner, by his own testimony, clearly was much more his son's conclusion than his and therefore was so unnecessarily suggestive as to deprive petitioner of due process particularly in light of the relationship between John and Edward Cosmi.

Additionally, we see no reason to limit the condemnation of *Stovall*, in this case, to improperly suggestive procedures initiated and/or executed by law enforcement personnel to the exclusion of laymen. Such selectivity would be totally illogical and utterly without saving rationale particularly where, as here, the police had it within their power to hold the identification procedure free of undue suggestion. It is stating the obvious to observe that with Edward Cosmi's identification having already occurred the police could have placed petitioner and others in an appropriate lineup and then given John Cosmi the opportunity to make his identification, independently of the suggestion of another. See-*Simmons v. United States*, 390 U.S. at 386, fn 6.

(d) the propriety of the in-court identification by John Cosmi depends of course upon whether it was tainted by his out-of-court identification found improper in (c). *United States v. Wade*, supra at page 240.

In view of the manner in which John Cosmi made his photographic identification of petitioner and in light of the nature and extent of his corporeal observations of his assailants at the time of the crime it is our conclusion that his in-court identification of petitioner was undoubtedly tainted by the prior procedure. Because this question is a matter of law and not of fact, the presumption of correctness contemplated as to the latter by 28 U.S.C.A. § 2254 (d) does not apply. *Townsend v. Sain*, 372 U.S. 293 (1963). But even if it were otherwise that presumption would still not attach because with all due regard to the trial court's conclusion we find that it "is not fairly supported by the record". 28 U.S.C.A. § 2254 (d) (8).

(e) The admissibility of Edward Cosmi's in-court identification depends upon whether it was tainted by his observation of petitioner on the morning of March 25, 1968. *United States v. Wade*, supra at page 240. Based upon the totality of the cir-

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[1]See, however, *United States v. Zeiler*, No. 19,449, decided September 15, 1971. — F.2d —.

cumstances disclosed by the trial transcript including such factors as his initial opportunity to observe the robbers face to face and free from stress, his deliberate effort in reasonable lighting conditions to commit their features to memory and his prior photographic identification, we conclude that his in-court identification of petitioner had a source independent of the illegal lineup. *United States v. Zeiler*, 447 F.2d 993 (3 Cir. 1971).

II

Petitioner's remaining contention is that the trial court's supplemental charge, given after the jury had been deliberating five hours and had sent word that it was apparently deadlocked, violated his constitutional right to a fair trial. Suffice it to say that a reading of that charge and its appraisal against the standard of *United States v. Fioravanti*, 412, F.2d 407 (3 Cir. 1969) fails to persuade us that there is merit to this contention. Instructions are not generally cause to grant the relief sought absent an infirmity of constitutional dimension which we do not find here. In any event *Fioravanti* applies only to federal jury trials held after June 16, 1969 and is clearly inapplicable here. *United States ex rel. Brothers v. Rundle*, 414 F.2d 244 (3 Cir. 1969).

III

Although not alleged as a ground for the issuance of the writ sought it is appropriate here to mention petitioner's motion for a new trial on the ground of newly discovered evidence and particularly its supporting affidavit given by his then attorney. Para. two of that affidavit reads as follows:

> "Following the trial of this matter I was approached by the victim of the said offense, Edward Cosmi, on Thursday evening, July 25, 1968. At that time in a conversation with me he stated that he was not certain of the identification of the hold-up man, but he was certain of his identification of Clay Thomas at trial because the police told him they had an informant that saw Clay Thomas enter his building.

This motion was withdrawn prior to argument, apparently as the result of plea bargaining over other charges according to petitioner's brief in this Court. While the substance of the

paragraph quoted from counsel's own affidavit raises certain rather obvious questions it is not the role of this Court in these circumstances to insist that the motion or its grounds be pursued in this or any other form, particularly in light of petitioner's express acquiesence in that withdrawal. *Johnson v. Zerbst*, 304 U.S. 458 (1938).

IV

A final but heretofore unraised issue remains: Was Edward Cosmi's in-court identification tainted by the photographic procedure attended by him and his father on March 27, 1968. For the reasons set out in I (e) above we conclude that it was not.

V

In light of the foregoing it is our recommendation that the conviction be vacated and petitioner discharged unless the State retrys him within 60 days of the Memorandum and Order of this Court at which trial no reference is to be made to John Cosmi's identifications, in-or-out-of-court, of petitioner[2], or to Edward Cosmi's out-of-court identifications on March 25 and 27, 1968.

The record[3] here makes an evidentiary hearing unnecessary. *Townsend v. Sain*, 372 U.S. 293 (1963).

Respectfully submitted,

Dated:

John W. Devine

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[2]Under *Gilbert v. California*, 388 U.S. 263, 272 (1967) the State does not have the opportunity to establish that John Cosmi's in-court identification had a source independent of his illegal out-of-court procedure.

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[3]The following exhibits have been received:

P1: Petitioner's brief and appendix on this application.

P-2: Trial transcript State v. Thomas on Passaic County Indictment 554-67 in 3 volumes.